Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
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| GTE Telephone Operating Companies | ) | CC Docket No. 98-79 |
| GTOC Tariff F.C.C. No. 1 | ) | |
| GTOC Transmittal No. 1148 | ) | |
| | ) | |
| Pacific Bell Telephone Company | ) | CC Docket No. 98-103 |
| Pacific Bell Tariff F.C.C. No. 128 | ) | |
| Pacific Transmittal No. 1986 | ) | |
| | ) | |
| BellSouth Telecommunications, Inc. | ) | CC Docket No. 98-161 |
| BellSouth Tariff F.C.C. No. 1 | ) | |
| BellSouth Transmittal No. 476 | ) | |

## OPPOSITION OF AT&T CORP. TO DIRECT CASES

Pursuant to the Commission's Orders designating issues for investigation with respect to the above three transmittals, AT&T Corp. ("AT&T") hereby submits its Opposition to the Direct Cases of GTE Service Corporation ("GTE"), Pacific Bell Telephone Company ("Pacific"), and BellSouth Telecommunications, Inc. ("BellSouth") in the above-captioned proceedings.[1]

## I. INTRODUCTION

AT&T and a number of other parties raised several concerns about the ADSL tariffs filed by GTE, Pacific and BellSouth. Among the issues raised in those Petitions were whether it is lawful for the ILECs to only offer an ADSL local loop when combined

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[1] See GTE Order Designating Issues for Investigation, DA 98-1667 August 20, 1998; Pacific Bell Order Designating Issues for Investigation, DA 98-1772, September 2, 1998, and BellSouth Order Designating Issues for Investigation, DA 98-1734, September 1, 1998

with their separate frame relay services, a practice which the Bureau and GTE both now appear to agree is not proper.[2] The Commission found that these Petitions "raised substantial questions of lawfulness" that necessitated the suspension and investigation of the tariffs.

The three Designation Orders pose the question of whether the ADSL services proposed by these three ILECs are interstate services, and whether they should be tariffed at the interstate level or the intrastate level.[3] As explained below, AT&T does not dispute the ILECs' right to file interstate tariffs for appropriate elements of the ADSL services that are being proposed. However, given that the ILECs are obligated to unbundle and offer the xDSL loop as a separate service, the central question thus becomes what is the appropriate regulatory forum for the tariffing of the ADSL loop

## II. UNDER REGULATORY AND INDUSTRY PRACTICE, INTRASTATE TARIFFS ARE UTILIZED FOR LOCAL LOOP SERVICES

The ILEC tariff proposal, which proposes the use of access tariffs for the purchase of local loop capabilities, is a clear departure from past industry and regulatory practices ADSL facilities are indistinguishable from other subscriber line facilities provided by ILECs under intrastate tariffs, as GTE's description of its ADSL service reveals. As GTE explains, ADSL is a "transmission and transport service only," provided at different data

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2 The Bureau remarked that "GTE has stated that its DSL service is to be offered on an unbundled basis so that CLECs may interconnect their networks with GTE's ADSL network at any technically feasible point." GTE Designation Order at ¶ 19. The obligation to offer the ADSL loop service separately from the frame relay service is derived from both Section 251(c) and Section 201(b).

3 AT&T is filing an Application for Review of the GTE and Pacific Bell Designation Orders because the Designation Order did not set for investigation the other issues raised by the parties.

speeds, between the customer's premises and the ADSL wire center where a connection is established to GTE's frame relay service.[4] In other words, ADSL is just a standard loop that has been specially conditioned in order to increase its bandwidth, and which GTE has (improperly in AT&T's view) bundled with its frame relay service. However, ILECs have traditionally provided loop services, whether ordinary voice or specially conditioned loops such as ISDN, under intrastate tariffs.

The three Direct Cases are largely devoted to arguing that the FCC has jurisdiction over interstate and international calling via the internet.[5] AT&T agrees with the ILECs that the FCC has jurisdiction over interstate and international telecommunications involving internet traffic. Determining that the FCC may have some jurisdictional standing with respect to such traffic does not, however, answer the question as to what is the appropriate forum for regulation of these ADSL services, consistent with regulatory and industry practices and the public interest.

In that regard, the existence of FCC jurisdiction does not compel the conclusion that all elements of a service must be offered under FCC tariffs. For example, it is clear that the FCC has "jurisdiction" over ordinary POTS subscriber loops. It has developed policies for the recovery of the interstate portion of POTS loop costs, and ILECs like GTE, BellSouth and Pacific Bell file tariffs at the FCC for the recovery of those costs. And through its Part 68 rules, the FCC has implemented policies regarding the connection of subscriber devices to those POTS subscriber loops. But despite the FCC's

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4 Transmittal No. 1148, Description and Justification at 3.

5 See, e.g., GTE Direct Case at pp. 7-24; Pacific Direct Case at pp. 4-13; BellSouth Direct Case at pp. 8-17.

"jurisdiction" over POTS loops, the actual retail tariffs to establish the customer's basic connection to the network are not filed at the FCC. Instead, the traditional industry and regulatory practice is that tariffs for local loop services are filed at the state commissions.

In fact, while these ILECs have proposed a single, interstate bundled service for ADSL (which AT&T and others have shown to be unlawful), US West has appropriately tariffed its ADSL services. Under US West's tariffs, "the link between the subscriber and the xDSL equipment is provided pursuant to intrastate tariffs" whereas the link from the xDSL equipment and the ISP is "provided via intrastate or interstate tariffs."[6] US West has correctly separated the components that other ILECs have improperly tied, and has put its ADSL loop service in its intrastate tariffs.

A second point of reference can be found in the industry tariffing practices associated with ISDN loops. With ISDN, the retail end user's loop is equipped with electronics that allow the loop to be used for ordinary circuit switched voice service as well as for high speed data, and this "dual function" of the ISDN local loop has a close parallel in ADSL.[7] ILEC customers are able to order an ISDN loop in a single transaction, pursuant to a single intrastate tariff, and billed on a single bill.

Finally, there is another reason why the FCC should hesitate to adopt the ILEC view that the "data" portion of an ADSL loop is an interstate "access" service sold to ISPs and largely outside of state regulation and tariffing. Today's ADSL technologies utilize a

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6 See US West ex parte filing, CC Docket No. 98-78, July 21, 1998.

7 While the technical characteristics of ISDN and ADSL are of course different, ISDN is perhaps the closest parallel to ADSL, since both services utilize electronics to augment the transmission capacity of the copper loop by providing two separate paths, one for voice and the other for data.

"splitter" to separate out ordinary voice transmissions from data transmissions and create a separate, circuit switched voice path The ILECs propose to apply a separate intrastate local exchange tariff for this voice service However, it is entirely possible, if not likely, that future xDSL technologies will incorporate "IP voice" capability within the data stream, and eliminate the need for a separate circuit switched path. Once that technological development happens, the tariff structure that GTE, Pacific and BellSouth are proposing would appear to place all of the customer's loop services, including their "voice" communications, under a federal access tariff, and in the exclusive control of their ISP. The ILECs' proposed tariff structure would appear to leave no role for state commissions to play in the regulation of end user local loop rates, terms and conditions under those circumstances.

Accordingly, industry practices in general, and the examples of ISDN loops and US West's ADSL services in particular, demonstrate that the ADSL "loop" service should be tariffed at the intrastate level.[8] Moreover, as discussed below, there would appear to be a number of potential practical problems with the tariffing approach advocated by GTE, Pacific and BellSouth, which suggest that the public interest may be better served through intrastate tariffing of the ADSL service.

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[8] While it is true that a retail end user will need to develop an arrangement with an ISP in order to make effective use of an xDSL service, AT&T does not believe that this fact leads to the conclusion that the ISP must be the customer for the local loop services. After all, retail local loop customers need to make arrangements with interexchange carriers in order to establish one-plus dialing arrangements, but it has never been suggested that interexchange carriers must order their customer's local exchange services. Moreover, in the current predominantly "dial up" environment for internet access, retail end users routinely establish relationships with their ISPs, not the other way around.

## III. ADSL SERVICE SHOULD BE OFFERED TO RETAIL CUSTOMERS UNDER INTRASTATE TARIFFS.

The tariffing approach proposed by these three ILECs would appear to disenfranchise end users, and would needlessly bifurcate end user loop services.[9] GTE's Direct Case is blunt in explaining that its approach to tariffing xDSL will likely leave retail customers largely "out of the loop" in ordering xDSL -- if a customer attempts to order an xDSL service from GTE's access tariff, GTE says the customer could end up with "connectivity to nowhere."[10] Such a result hardly provides for fair customer choice for advanced data services. Moreover, ILEC Operational Support Systems for access services are quite different than those used for retail services, and thus the decision to classify ADSL as an "access" service could have implications on the ability of retail customers to deal with the ILEC in a convenient and efficient manner if they wished to order ADSL service themselves.[11]

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9 See, e.g., GTE Direct Case, p. 6 at n.14.

10 GTE Direct Case, p. 4 at n.8.

11 For example, access services are ordered using "Access Service Requests," or ASRs. The ASR process is a complicated software driven system that involves customer submission of detailed service specifications in order to request service. ASRs are not a "user friendly" process that could reasonably accommodate mass market sales efforts. If classifying ADSL as an "access" service means that ASRs are the only means by which to order the service, this decision could have a material impact on the ability of retail end user customers to order ADSL services in a convenient manner. Access products also use different operating systems for billing and other purposes than ordinary retail services. Thus ILEC statements that retail end user customers can order and use ADSL under the access tariffs (GTE Direct Case at p. 4) ignore the practical difficulties that unsophisticated retail customers would encounter in trying to do so.

Because the ILECs have not addressed how their use of access tariffs for ADSL loops would operate compared to more traditional methods of ordering loop services, it is not possible to evaluate the overall implications in detail. However, the fact that the ADSL data service is dependent on the underlying local exchange voice service, and that different customers will therefore have an interest in the same local loop, would appear to present a number of potential difficulties.

For example, if one ISP is currently the customer of record for a particular end user's loop, the customer cannot, on their own, choose a new ISP. Instead, customers must get the ISP that is the current "access customer" for their loops to cancel its service, and then the customers must arrange with another ISP to order "access service" to "re-activate" their local loops for xDSL service. Customers cannot, therefore, directly control the use of their local loops for data.

Consider the situation if the first ISP has a billing or other dispute with the end user. Under such circumstances, it would be possible that the ISP might decline to withdraw its ADSL service and permit the customer to select another ISP until the customer settles the ISP's bill. Such a result could leave customers unable to exercise choice in their selection of an information service provider.

Problems could also arise if an ISP ceases to pay its bills to the ILEC for xDSL loops, or is engaged in a billing dispute of its own with the ILEC. Logically, it would seem that customers would have the data capability of their local loops cut off when the ILEC cancels the ISP's "access service" for non-payment, even where customers are current on their bills to the ISP. Since retail end users, under the ILECs' access tariff approach, have no "standing" with respect to the data portion of their local service, they

cannot directly control the activation, continuation or termination of the data portion of their local loop service.

A similar situation could affect the ISP. If end user customers have their local exchange service terminated for non-payment, or if end users move without notifying the ISP, the ISP might find itself with continued charges for an ADSL service with no customer attached. There are, therefore, a variety of potential problems as a result of the ILECs' proposal to divide the data and voice portions of the local loop between two different tariffs and two different customers.

The approach most consistent with existing law, and most practical from an end user perspective, is for ADSL loops to be offered under intrastate tariffs.[12] The interstate "interconnection" or "access" component associated with the use of ADSL loops can be separately identified and tariffed with the FCC or state commissions as US West has done.

Moreover, once an appropriate retail end user tariff has been filed for ADSL service, there would no longer appear to be a pressing need for the filing of a "data loop" service in the ILEC's interstate access tariffs. Pursuant to the resale requirements of Section 251(c)(4) of the Act, the ILECs will necessarily offer ADSL service for resale under intrastate tariffs. Under such circumstances, there would appear to be little purpose

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[12] Directing ILECs to tariff ADSL loops at the intrastate level is not inconsistent with a view that the FCC enjoys some measure of jurisdiction over such services. The ILEC Direct Cases describe in detail the fact that the FCC has for over a decade chosen to delegate, through state tariffs, the setting of the rates, terms and conditions for the "interstate" basic services underlying enhanced services. In another context, the FCC elected to delegate to intrastate tariffs the establishment of the rates, terms and conditions for WATS lines that would be used for the termination of interstate calls. See American Telephone and Telegraph Companies, Restrictions on the Resale and Sharing of Switched Services used for Completion of Interstate Communications, 94 F.C.C.2d 1110, 1116 (1983), affirmed, National Assn. of Regulatory Util. Commrs. v. FCC, 746 F 2d 1492 (D.C. Cir. 1984).

to be served in filing an ADSL "loop" service in interstate access tariffs, since such a tariff would presumably simply duplicate the rates, terms and conditions of the intrastate ADSL loop tariff.

## IV. THE REGULATORY STATUS OF ADSL SERVICES HAS NO BEARING ON RECIPROCAL COMPENSATION FOR DIAL UP ISP CALLING.

The fact that the FCC has a clear jurisdictional interest in ADSL services does not compel any conclusions regarding the appropriate treatment of dial up internet calling under reciprocal compensation agreements.[13] That issue is an entirely separate question, as GTE itself recognizes [14] Whether local exchange carriers should pay local reciprocal compensation amounts is purely a matter of contract interpretation,[15] and is unaffected by the Commission's decision here.[16] The reciprocal compensation status of calls to ISPs is an issue that has been, or is being, addressed in a number of federal courts and state public utility commissions. Indeed, several federal courts, together with almost two dozen state

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[13] Moreover, the technology used in the case of ADSL is different than the technologies used in the provision of dial up access to ISPs, where ordinary local "POTS" services, facilities, routing and billing practices apply. Accordingly, any decisions regarding the tariff treatment and jurisdictional status of ADSL are inapplicable to the question of the appropriate reciprocal compensation treatment of dial up ISP calls.

[14] GTE Direct Case at p. 7.

[15] The fact that dial up calls to ISPs are to be treated as local calls for purposes of interconnection agreements is, if anything, simply a natural consequence of the FCC's decision to exercise its jurisdiction over such calls by requiring that they be made subject to state tariffing and pricing policies.

[16] The FCC has declined to seek primary jurisdictional referral of this issue. See Response of the Federal Communications Commission as Amicus Curiae to Motion for Referral of Issue, BellSouth Telecommunications Inc. v. US LEC of North Carolina, L.L.C. and the North Carolina Utilities Commission, Civil Action No. 3:98CCV170-MU.

public utility commissions, have unanimously found that dial up internet traffic is subject to the reciprocal compensation provisions of ILEC-CLEC interconnection agreements.[17] Accordingly, the Commission should not attempt to address these reciprocal compensation matters in the context of this proceeding.

## V CONCLUSION

For the foregoing reasons, the Commission should find that ILECs should offer ADSL loops under an intrastate tariff.

Respectfully submitted,

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[17] See, e.g., Illinois Bell v. Worldcom Technologies, Inc., Case No. 98 C 1925, slip op. at 6. (N.D. Ill. 1998); Southwestern Bell Telephone Company v. Public Utilities Comm'n of Texas, 98 CA 043 (WD TX June 16, 1998).

## CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 18th day of September, 1998, I have caused a copy of the foregoing "Opposition of AT&T Corp. to Direct Cases" to be served by U.S. first class mail, postage prepaid, on the parties listed on the attached Service List.

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